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SENNIGER POWERS LLP ONE METROPOLITAN SQUARE 16TH FLOOR ST LOUIS, MO 63102				SONG, MATTHEW J
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JOHN DAVIS HOLDER

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Appeal 2008-1072  
Application 10/002,862  
Technology Center 1700

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Decided: July 31, 2008

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Before EDWARD C. KIMLIN, THOMAS A. WALTZ, and  
PETER F. KRATZ, *Administrative Patent Judges*.

KRATZ, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant requests rehearing of our Decision of March 10, 2008, wherein we affirmed the Examiner's decision to reject all the appealed claims under 35 U.S.C. § 103(a). In accordance with Appellant's Request, we have reconsidered our Decision in light of the arguments advanced in Appellant's Request, but we find no error therein.

We remain of the opinion that it would have been obvious within the meaning of 35 U.S.C. § 103(a) for one of ordinary skill in the art to arrive at the claimed subject matter from the applied prior art for reasons stated in our Decision.

As we previously stated:

Concerning the intermittent feed limitation of the claimed method, we agree with the Examiner's conclusion that it would have been obvious to one of ordinary skill in the art to feed granular silicon in a discontinuous or intermittent fashion for deposit on the non-melted charge of the melting crucible of Holder as an alternative to supplying such material in a continuous fashion based on the totality of the evidence of record. In this regard, we observe that Appellant has acknowledged that a prior art device for the metered or controlled delivery of solids, such as silicon in such an intermittent fashion is known (Specification, p. 14, l. 28 – p. 15, l. 5).<sup>1</sup> Given the teachings of Holder and this acknowledged prior art, the record furnishes ample evidence to support the Examiner's obviousness determination as to the alternative of intermittently feeding the added granular silicon of Holder. As pointed out by the Examiner, there are only two options in that Holder's added granular silicon must be delivered in either a continuous or discontinuous (intermittent) fashion (Ans. 3). Selecting the latter option would have been well within the ordinary skill of the artisan based on this record.

Dec. 4-5.

Appellant asserts in the Request that we "misapprehended the significance of Appellant's acknowledgement..." of the known availability of a prior art device for the intermittent metered or controlled delivery of

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<sup>1</sup> The starting point for Appellant's invention, for purposes of 35 U.S.C. § 103(a), is what Appellants acknowledge to be prior art. *In re Facius*, 408 F.2d 1396, 1406 (CCPA 1969); *In re Davis*, 305 F.2d 501, 503 (CCPA 1962).

solids as presented in Appellant's Specification to a process of preparing a silicon melt wherein solid (silicon) is delivered (Req. 1-5). We disagree.

As we previously found in our Decision, Holder discloses or suggests the controlled delivery of granular silicon to a crucible during the preparation of silicon melt (Dec. 4). We did not rely on the acknowledged prior art for this process teaching. Moreover and as we previously determined, one of ordinary skill in the art would have readily recognized that Holder did not require continuous delivery of granular silicon to accomplish Holder's objective of adding granular silicon in a controlled manner to the crucible during silicon melt preparation (Dec. 4).

Appellant's arguments presented in the Request concerning the intermittent delivery limitation are not persuasive of the non-obviousness of the claimed process on this basis for the reasons stated in our Decision. Thus, we continue to hold "that conducting the granular silicon delivery of Holder in a discontinuous fashion would have been an obvious option well within the grasp of one of ordinary skill in the art based on the prior art teachings and acknowledgments before us..." (Dec. 7).

With regard to the Group IV claims (rejected claims 52-58, 60, 62-67, and 90-96), Appellant presents new arguments in the Request. Appellant presents argument for the first time based on an assumption of intermittent granular silicon feed in Holder according to a feed rate that Holder teaches or suggests, whereas in the Brief the arguments were based on either a continuous granular silicon feed occurring in Holder or on the notion that a discontinuous feed (in Holder) would occur at a rate corresponding to a rate for constant melt level during simultaneous pulling/replenishing operation, as allegedly taught by Kamio (Br. 29-31). The Examiner responded to these

arguments by asserting that the recited wedge formation would be expected to occur with the obvious use of intermittent silicon feed in Holder (Ans. 10-11<sup>2</sup>). Appellant did not offer a specific rejoinder to these determinations of the Examiner in the Reply Brief.

It is well settled that the presentation of new argument in a Request for Rehearing is untimely and inappropriate. *See 37 C.F.R. § 41.52 (2007).* An argument presented for the first time in a Request but not advanced in the Appeal Brief or appropriately furnished in a Reply Brief is not properly before the Board, at least in part, because the Examiner is not afforded a timely opportunity to respond and the Board is deprived of any such response that may have been supplied by the Examiner to the belatedly presented new argument. *See In re Kroekel*, 803 F.2d 705, 709 (Fed. Cir. 1986). "A party cannot wait until after the Board has rendered an adverse decision and then present new arguments in a request for reconsideration." *Cooper v. Goldfarb*, 154 F.3d 1321, 1331 (Fed. Cir. 1998) (citing *Moller v. Harding*, 214 USPQ 730, 731 (Bd. Pat. App. & Int. 1982), *aff'd*, 714 F.2d 160 (Fed. Cir. 1983) (table)).

We note that new arguments which were not presented in the Appeal Brief or a Reply Brief will not be considered. 37 C.F.R. § 41.37(c)(vii) (2007). Consequently, we consider the new arguments presented in the Request with respect to the Group IV claims as having been waived by Appellant.

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<sup>2</sup> The Examiner's references to Hansen are readily understood as being references to Holder as we noted in our Decision (Fn 3).

Appeal 2008-1072  
Application 10/002,862

We have granted Appellant's Request to the extent we have reconsidered our Decision as indicated above, but we decline to make any change therein.

DENIED

tf/ls

SENNIGER POWERS LLP  
ONE METROPOLITAN SQUARE  
16TH FLOOR  
ST. LOUIS, MO 63102